No. 82-1166

IN THE

Supreme Court of the United States

October Term, 1982

ZURN INDUSTRIES, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FERGUSON & BURDELL
William B. Moore
James E. Hurt*
Attorneys for Zurn Industries, Inc.
**Counsel of Record*

Office and Post Office Address:
29th Floor, One Union Square
Seattle, Washington 98101
Telephone: (206) 622-1711

ABCD AT CRAFTSMAN PRESS, SEATTLE

THE QUESTION PRESENTED FOR REVIEW

Did the National Labor Relations Board properly conclude its *Wright Line* decision, 251 NLRB #150 (1980), may be retroactively applied to reverse an Administrative Law Judge's factual finding of no violation of the National Labor Relations Act based on the Board's conclusion that a *prima facie* showing was made that an employer's decision to terminate a construction crew was motivated in part by employee involvement in protected activities and the employer failed to carry a burden of persuasion that its asserted reason for the termination was not pretextual when differing standards are also applicable to the employer under the Occupational Safety and Health Act?

THE PARTIES TO THE PROCEEDING

The parties to the proceeding are Zurn Industries, Inc. and the National Labor Relations Board.

TABLE OF CONTENTS

TABLES OF AUTHORITY

Table of Cases

STATUTES

OTHER AUTHORITY

IN THE

Supreme Court of the United States

October Term, 1982

ZURN INDUSTRIES, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REFERENCES TO THE OFFICIAL REPORTS OF THE NLRB AND THE COURT OF APPEALS OF THE NINTH CIRCUIT

The decision of the National Labor Relations Board is reported at 255 NLRB #88.

The decision of the Ninth Circuit Court of Appeals is reported at 680 F.2d 683 (1982).

THE GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The judgment of the Court of Appeals for the Ninth Circuit was entered July 2, 1982. (Appendix 1.)

Zurn's Petition for Rehearing in the Ninth Circuit was denied October 8, 1982. (Appendix 115.)

The Supreme Court's jurisdiction to review the judgment or decree is derivative and arises from the jurisdiction of the Court of Appeals of the Ninth Circuit in the first instance pursuant to 29 U.S.C. § 160 (f); FRAP 15; 5 U.S.C. § 706, and then upon the U.S. Supreme Court pursuant to 28 U.S.C. § 1254(1). And *see* 28 U.S.C. § 2101(c).

STATUTES AND REGULATIONS INVOLVED IN THE CASE

See Appendix 117-132

CONCISE STATEMENT OF THE CASE

After serious deficiencies were noted in the work performed by its concrete crew engaged in the construction of a cooling tower at a nuclear site in Washington State, the employer Zurn Industries terminated all members of the crew except the foreman.

Grievances were filed pursuant to the collective bargaining agreement under which the employees were hired. A first-stage grievance adjustment provided the workers eligibility for reemployment with Zurn but not in the performance of concrete work.

The terminated employees then filed complaints with various federal and state agencies including the National Labor Relations Board, U.S. Department of Labor and the Washington State Department of Labor and industries claiming in substance that Zurn's decision to terminate them was motivated by the employees' assertion of job safety concerns.

Following a hearing before an NLRB Administrative Law Judge, the ALJ on July 16, 1980, ordered the Complaint dismissed in its entirety. (Appendix 74-114).

Thereafter, on April 6, 1981, the Board applied its subsequent decision of August, 1980, in *Wright Line*, 251 NLRB #150 (1980), and sustained the employees' complaint. It found a *prima facie* case had been established that employee safety concerns were "a" motivating factor in Zurn's decision to terminate the crew and that Zurn had

failed to prove that its concern about defective concrete work was other than pretextual.

Pursuant to 29 U.S.C. § 160(f), Zurn petitioned the United States Court of Appeals for the Ninth Circuit to review and set aside the Board's decision and order. On July 2, 1982, the Ninth circuit issued its opinion affirming the Board. Zurn's Petition for Rehearing and Rehearing *En Banc* was denied October 8, 1982. *Zurn Industries v. NLRB*, 680 F.2d 683 (9th Cir. 1982)

In its opinion, the Ninth Circuit, although noting that a different approach would be a proper implementation of the National Labor Relations Act and that both the First and Third Circuits had raised questions whether the Board's *Wright Line* decision was consistent with the Board's statutory charter, concluded that the Ninth Circuit must accept the *Wright Line* formulation as a reasonably defensible interpretation of the National Labor Relations Act. *Id.*, at 687-689. The Ninth Circuit rejected Zurn's contentions that the Board decision was contrary to federal safety policy and improperly disrupted the role of grievance settlements in safety matters. (*Id*).

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

Zurn's Petition for Certiorari should be granted because it presents on a fully developed record a number of important issues that frequently occur in federal labor law. One of those issues involves the propriety and meaning of the National Labor Relations Board *Wright Line* ruling, 255 NLRB No. 88. A number of the Courts of Appeal have either differed with the ruling itself or with each other as to the proper interpretation and reach of that decision. Interlocked with the Board's interpretation and application of its *Wright Line* ruling to the facts of this case is an important issue concerning the accommodation of federal labor policy as articulated under the National Labor Relations Act and federal safety policy under the Occupational Safety and Health Act, 29 § 1977.12, 38 Fed. Register 2681, 2683 (1973).

To elaborate briefly:

1. The Ninth circuit's decision is at odds with Congressional intent in the interpretation of the National Labor Relations Act as either suggested or held by the First and Third Circuits. *NLRB v. Wright Line*, a *division of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981), *cert denied* 102 S.Ct. 1612 (1982); *Behring International, Inc. v. NLRB*, 675 F.2d 83 (3d Cir. 1982); *NLRB v. Blackstone Co., Inc.*, 111 LLRM 2182 (3d Cir., Aug. 11, 1982). *See NLRB v. Transportation Management Corporation*, 674 F.2d 130 (1st Cir. 1982), *cert granted* 51 U.S. L. Week 3373 (1982).

2. The decision of the Board and the affirmance by the Ninth Circuit undermines the favored place that this Court has indicated should attach to grievance resolutions of safety related disputes. *Gateway Coal Company v. United Mine Workers*, 414 U.S. 368, 379, 38 L.Ed.2d 583, 593 (1974). The Board decision is not entirely clear on the point but appears to require reinstatement of employees to concrete crew positions while the grievance settlement rendered pursuant to the collective bargaining agreement made the employees ineligible for rehire to such positions.

3. The Ninth Circuit's opinion does not fully address and leaves unsettled whether the more limiting provisions of Department of Labor regulations promulgated pursuant to OSHA [*see Whirlpool Corp. v. Marshall*, 445 U.S. 1, 63 L.Ed.2d 154 (1980)] are applicable to employee safety complaints or the amorphous parameters of the National Labor Relations Act are the standard by which employer actions arguably involving safety matters will be measured. Pursuant to the OSHA regulations, employer discipline including termination is contemplated unless the alleged infraction is brought specifically to the employer's attention, the situation remains uncorrected, other avenues of redress are exhausted and the alleged safety concern presents a serious risk of injury or death. Authority is granted under OSHA to redress retaliatory terminations. *Whirlpool Corporation v. Marshall, supra.* Neither the Board nor the Ninth Circuit attempted to blend and reconcile OSHA and NLRB requirements into a unified standard.

The absence of procedures implicit in the Board approach when alleged job safety issues arise blindsides an employer with responsibilities that could have been avoided if OSHA procedural requirements were deemed applicable to alleged job safety complaints. Equally important, the OSHA requirements contribute to a job site resolution of the alleged safety problem rather than punishing the employer with back pay liability for its handling of a situation where job performance was at least as real an issue as job safety.

4. By shifting the burden to employers to prove a "good" reason for the termination of employees whenever proof is made according to an inexact "*prima facie*" standard that "a" motivating factor in the employer decision was an employee's engagement in protected activity, the Board has abrogated without discussion or Congressional authorization an employer's immunity for termination of at will employees without having to demonstrate good cause to uninvolved parties. *NLRB v. McCahey*, 233 F.2d 406, 412, 413 (5th Cir. 1956); *Lozano Enterprises v. NLRB*, 357 F. 2d 500, 502 (9th Cir. 1966); *NLRB v. Joseph*, 605 F.2d 466, 468 (9th Cir. 1979).

5. By making the absence of *pro forma* employer denials of unlawful motivation a decisive factor in deciding employer guilt or innocence, the Board decision and the Ninth Circuit affirmance have done violence to the fact finding prerogatives of the Administrative Law Judges contemplated by the Congressional scheme, particularly in credibility matters contrary to *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 95 L.Ed. 456 (1951). Compare *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 291, 4 L.Ed.2d 1218 (1960); *Lundgren v. Freeman*, 307 F.2d 104, 113 (9th Cir. 1962). Without much discussion of the issue, the Ninth Circuit's affirmance of the Board decision degrades the fact finding function whenever particular shreds of evidence are uncontradicted and enshrines a "checklist" approach that requires rather meaningless denials of wrongful motivation.

6. By conferring the weight it did to the Board's burden of proof ruling in *Wright Line*, *supra*, the Ninth Circuit went far to frustrate the Congressional mandate for meaningful court review of Board decisions in discharge cases. The

Board's standard as retroactively applied to Zurn permits the Board to put the outcome of virtually any case beyond the pale of court review on the basis of uncorroborated testimony of a charging party. This is contrary to the Ninth Circuit's decision in *Amco Electric v. NLRB*, 358 F.2d 370 (9th Cir. 1966).

This Court itself has wrestled with the question of what deference should be paid to the Board's determinations on issues of law, often without articulated standards as to when and under what circumstances great or little deference is entitled. In last year's term, for example, in *Charles D. Bonanno Linen Service v. NLRB*, ___ U.S. ___, 70 L.Ed.2d 656, 667, the case was characterized as turning "in major part on the extent to which the court should defer to the Board's judgment . . ."

In the same term, *Wolke and Romero Framing, Inc. v. NLRB*, ___ U.S. ___, 72 L.Ed.2d 398 (1982), the Board's interpretation of the construction industry *proviso* under the National Labor Relations Act as refined by the opinion of the Court of Appeals for the Ninth Circuit was reviewed, but this Court did not address the question what, if any, weight should attach to the Board's interpretation as opposed to the Ninth Circuit's interpretation or even the interpretation of the Supreme Court itself. Where the Board already enjoys by Congressional mandate inhibited review of factual determinations, according it unbridled latitude to superimpose new allocations of burden of proof renders the promise of meaningful court review of agency action significantly diminished. The case at bar is an excellent opportunity to articulate what standards, if any, should

apply to court deference to agency allocations of burden of proof and similar legal determinations.

Zurn's Petition for Certiorari should be granted.

Respectfully submitted this 5th day of January, 1983.

FERGUSON & BURDELL

By: _____

James E. Hurt* and
William B. Moore

Attorneys for Zurn Industries, Inc.
**Counsel of Record*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Jul 2 1982 Clerk, US Court of Appeals]

ZURN INDUSTRIES, INC., Petitioner,	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD, Respondent.	)	NOS. 81-7219 81-7331

OPINION

Argued and Submitted -- April 7, 1982

Decided -- , 1982

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Before: HUG and SKOPIL, Circuit Judges, and SCHWARZER, District Judge*.

Petitioner, Zurn Industries, Inc. (Zurn), appeals from a decision of the National Labor Relations Board (Board) holding that Zurn's discharge of six employees was an unfair labor practice in violation of Section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C.

---

*The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

§ 158(a)(1).[1/] The Board cross-appeals for enforcement of the order.

Zurn contracted with the Washington Public Power Supply System to design and construct concrete cooling towers for a nuclear power plant near Satsop, Washington. The six employees in question were Zurn's concrete placement crew ("mud crew") for the jobsite. On August 15, 1979, these employees were among those attending one of Zurn's regular weekly safety meetings. The main topic at the meeting was employee concern over Zurn's newly acquired safety skip, a device used to move injured workers. Procurement of an adequate safety skip had been a source of controversy between the workers and management for several months. The meeting generated a heated discussion. Field Superintendent Buffington came from his adjacent office and interrupted the meeting, telling the

group in an annoyed tone that he was "tired of hearing all this commotion about safety and especially about this safety skip," that dissatisfied employees should "talk to the steward about it," and that anyone who did not like that procedure wcould "pick up their checks."2/ The meeting broke up when Buffington finished his remarks.

After the meeting, the mud crew reported for its concrete pour for the day. On arriving at the jobsite, the men discovered that the forms were not yet finished, lacking safety handrails and ladders and fully capped rebars. The crew refused to begin the pour because the forms appeared both incomplete and unsafe. They reported the problem to the safety officer and waited for the forms to be completed, ignoring instructions from Quality Control Supervisor Lewis that Buffington wanted them to start work.3/ The crew began the

pour after lunch, but met with further difficulties when several pieces of equipment, the tremie chute carrying the concrete and two of the three vibrators used to prevent separation and air pocket formation, broke down.

The forms were removed two days later, on August 17, revealing serious deficiencies in the concrete structure including rock pockets and holes. The flaws in the pour were immediately reported to jobsite supervisors. That afternoon, the entire mud crew save the foreman received termination notices. Each notice stated that the worker to whom it was issued "does not work to our satisfaction."[4/] On receiving the notices, the crew members assembled at Buffington's office to protest their discharges. Although admitting the poor quality of the August 15 vibration work, they argued that the flaws were not their fault but were largely due to machine

deficiencies and breakdowns. Two of them also objected that four of the workers discharged had not been engaged in any work related to vibration at the August 15 pour. Buffington told the crew that the poor quality of the August 15 vibration work was the reason for their discharges. Three employees testified that when pressed Buffington said further that an additional reason for their discharges was their complaints about safety.5/

The crew members filed grievances with their union and unfair labor practice charges with the federal and state agencies. The Board issued a complaint against Zurn alleging violations of Section 8(a)(1) of the Act. An administrative law judge (ALJ) heard the evidence and concluded that the General Counsel had failed to prove that the crew had been discharged for engaging in the protected activity of expressing safety concerns. The Board

reviewed the record de novo and found that Buffington's remarks at the August 15 safety meeting threatened employees with discharge for engaging in protected activities relating to job safety, and that the General Counsel had made a prima facie showing that the motive for the crew's discharge was its complaints about safety. The Board went on to find that the asserted reason for the discharged based on the unsatisfactory work of the crew was a pretext, and that a violation of Section 8(a)(1) had therefore been proved.

We must enforce the Board's order if the Board correctly applied the law and if its findings are supported by substantial evidence on the record viewed as a whole. NLRB v. Nevis Industries Inc., 647 F.2d 905, 908 (9th Cir. 1981). Our review therefore entails a two-step process: did the Board apply a correct rule, and does substantial evidence support its order.

A. The Board's Standard for Causation

This case again brings before the court the recurring problem of mixed, dual or pretextual motive discharges.6/ In its recent decision in Wright Line, a Division of Wright Line, Inc., 251 N.L.R.B. No. 150 (1980), the Board sought to end the confusion generated by the use of a variety of tests for gauging the lawfulness of such discharges. See Western Exterminator Co. v. NLRB, 565 F.2d 1114, 1118 (9th Cir. 1977). It rejected both the "in part" test, under which the General Counsel had only to show the presence of a prohibited motive, and the "dominant motive" test requiring proof that an unlawful motive was the motivating cause for discharge. Taking its lead from the Supreme Court's decision in Mt. Healthy City School District Bd. of Education v. Doyle, 429 U.S. 274 (1977),7/ the Board developed a two-part test.8/ Under the test, the General Counsel has the

initial burden of proving that protected activity was a substantial factor in bringing about the discharge. Once the General Counsel has made this prima facie case, the burden shifts to the employer to prove, as an "affirmative defense," that the decision would have been the same in the absence of the protected activity.

This court has previously approved the Wright Line standard in NLRB v. Nevis Industries, Inc., supra; see also Doug Hartley Inc. v. NLRB, 669 F.2d 579, 580-81 (9th Cir. 1982); and Lippincott Industries, Inc. v. NLRB, supra, 661 F.2d at 115.9/ Recent decisions by the First and Third Circuits raise a question, however, whether the test as formulated in Wright Line is entirely consistent with the Act. NLRB v. Wright Line, a Division of Wright Line, Inc., 662 F.2d 899 (1st Cir. 1981), cert. denied, 102 S. Ct. 1612 (1982)

(enforcing the Board's Wright Line decision); Behring International Inc. v. NLRB, ___ F.2d ___, 93 Lab. Cas. (CCH) ¶13,392 (3rd Cir. April 7, 1982) (remanding to the Board for further consideration). Contra, NLRB v. Fixtures Manufacturing Corp., 669 F.2d 547, 550 & n.4 (8th Cir. 1982) (disagreeing with First Circuit's criticisms). Specifically, the First and Third Circuit decisions approved the Board's adoption of a "but for" test patterned on the reasoning of Mt. Healthy, but rejected the Board's procedural framework which shifts to the employer the burden of proving good cause. Both courts expressed concern that the Board's burden-shifting approach violates Section 10(c) of the Act in two ways: by placing a burden of proof on the employer when it should be entirely on the General Counsel,10/ and by allowing the General Counsel to prevail on the strength of a prima facie case

should the employer fail to sustain its burden of proving its affirmative defense.11/ To meet these concerns, these courts looked to the Supreme Court's decision in a Title VII discrimination case, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), decided after the Board's Wright Line decision, and found the approach there taken more appropriate for mixed motive cases than the Mt. Healthy approach. Under Burdine, after the plaintiff has made a prima facie showing of wrongful conduct, the burden of protection, not persuasion, shifts to the defendant. Once the defendant comes forward with evidence of a legitimate reason for its conduct, the burden shifts back to the plaintiff to prove that the defendant's proffered reason was not a "true" reason for the questioned action; that burden then merges with the ultimate statutory burden of persuasion.

We must accept the Board's Wright Line rule if it is a reasonably defensible interpretation of the Act consistent with its purposes, Ford Motor Co. v. NLRB, 441 U.S. 488, 496-97 (1979); NLRB v. Local 103 International Association of Iron Workers, 434 U.S. 335, 350-51 (1978); NLRB v. Nevis Industries, supra, 647 F.2d at 909. Although the Burdine approach would be a permissible implementation of the Act's purposes, we conclude that the Mt. Healthy approach used in the Board's Wright Line decision is within the Board's authority to adopt. We find support for that conclusion in the legislative history of the 1947 amendments to the Act. While the First Circuit read that history as "inconclusive" on the issue of burden of proof, NLRB v. Wright Line, supra, 662 F.2d at 904, n.8,12/ the Board, and commentators, have read it as reflecting an intention to place a burden of proof on the employer. Wright

Line, a Div. of Wright Line, Inc., supra, 251 N.L.R.B. at 1088; Brodin, The Standard of Causation in the Mixed Motive Title VII Action: A Social Policy Perspective, 82 Columbia L. Rev. 293, 297-98 n.6 (1982); DuRoss, Toward Rationality in Discriminatory Discharge Cases: The Impact of Mt. Healthy Board of Education v. Doyle upon the NLRA, 66 Georgetown L. Rev. 1109, 1123 n.69 (1978). We see no need to fathom the Congressional intent; it is sufficient for our present purposes if the history does not foreclose a legislative purpose to place on the employer the burden of proving the presence of a legitimate case. If that is the case, then the Board's interpretation cannot be rejected. With that background, we turn to the legislative history.

The "discharge for cause" language was added to Section 10(c) by the 1947 Taft-Hartley amendments.13/ The bill introduced by Congressman Hartley and passed by

the House of Representatives on April 10, 1947, had placed the burden of proving the absence of a legitimate cause for discharge on the General Counsel as follows:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, unless the weight of the evidence shows that such individual was not suspended or discharged for cause.

H.R. 3020, 80th Cong., 1st Sess. 39 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act of 1947 (hereinafter "Legislative History") at 31, 69 and at 158, 196 (1947) (emphasis added). The Senate amendments to the House bill omitted such a provision altogether. S. 1126, 80th Cong., 1st Sess. 28 (1947), reprinted in 1 Legislative History 99, 126; H.R. 3020 as passed Senate, 80th Cong., 1st Sess. 96, reprinted in 1 Legislative History 226, 254. A joint conference drafted a compromise version of the bill,

passed by both houses of Congress in June, 1947, which deleted the "weight of the evidence" language quoted above and cast the standard in affirmative rather than negative terms:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

H.R. Rep. No. 510, 80th Cong., 1st Sess. 13 (1947), reprinted in 1 Legislative History 505, 517 (emphasis added). The House Conference Committee report explained these revisions as follows:

> The House bill also included, in section 10(c) of the amended act, a provision forbidding the Board to order reinstatement or back pay for any employee who had been suspended or discharged unless the weight of the evidence showed that the employee was not suspended or discharged for cause. The Senate amendment contained no corresponding provision. The conference agreement omits the "weight of evidence" language, since the Board, under the general provisions of section 10,

> must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause (see Wyman-Gordon v. N.L.R.B., 153 Fed. (2) 480), will not be entitled to reinstatement. The effect of this provision is also discussed in connection with the discussion of section 7.

H.R. Rep. No. 510, 80th Cong., 1st Sess. 55 (1947), reprinted in 1 Legislative History 505, 559 (emphasis added).

In the Senate debate on the conference report, Senator Pepper of Florida, who opposed the legislation, and Senator Taft of Ohio, who favored it, discussed this provision.14/ Pepper expressed concern that the conference version placed on the General Counsel the burden of proving that the employee was not discharged for cause.

He pointed out that the House bill had clearly placed that burden on the employee, i.e., the General Counsel. The converees' deletion of the phrase "weight of the evidence," he argued, served only to eliminate a redundancy with regard to the nature of the burden of proof while preserving the House's intent with respect to its allocation. Taft, while agreeing that the original House bill did intend to shift to the General Counsel the burden of proving lack of cause, pointed out that the language had been taken out. He argued that the conference version simply left the burden of proving a legitimate cause for discharge with the employer where, according to Taft, it had always been.15/ The conference version was then adopted by the Senate.

The only other explicit mention of burden of proof allocation to be found in the legislative history is in Senator

Ball's remarks urging override of President Truman's veto of the Taft-Hartley amendments. Ball, too, read Section 10(c) as preserving a preexisting rule that the employer had the burden of proving its legitimate motive for discharge:

> [There] is an explicit provision inserted in the bill in conference, saying that if the employer proves to the satisfaction of the Board that he discharged an employee for cause, he cannot be held guilty of an unfair-labor practice in discharging him. That is exactly the rule which the courts now require the National Labor Relations Board to follow. In other words, if the National Labor Relations Board finds that an employer discharged an employee for cause, they cannot find him guilty of an unfair-labor practice, and it is up to the Board to make the decision.

93 Cong. Rec. 7523, 7529 (1947), reprinted in 2 Legislative History 1629, 1640 (emphasis added).

This history, although not conclusive, places a sufficient gloss on Section 10(c) to sustain the Board's Wright Line rule.

It shows that those who successfully advocated passage of the Taft-Hartley amendments over generally prolabor opposition did so in part at least on the strength of the argument that the burden of proving good cause for discipline would remain on the employer. The Board's rule, of course, does not relieve the General Counsel of its burden of proving an unfair labor practice by a preponderance of the evidence. See, Wright Line, a Div. of Wright Line, Inc., supra, 251 N.L.R.B. at 1088, n.11 (quoted in note 10, supra). But it does provide a "formal framework" for establishing legitimate justification, which the Board described as follows:

> Under the Mt. Healthy test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. Also, the employer is provided with a formal framework within which to establish its asserted legitimate justification. In this context, it

> is the employer which has "to make the proof." Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because its action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

251 N.L.R.B. at 1089.16/

B. Sufficiency of the Evidence

Having concluded that the Board applied a correct legal standard in the instant case,17/ we turn to the Board's factual findings. Our review is limited to a determination whether the Board's finding that Zurn discharged the six employees because of their safety-related actions is supported by substantial evidence on the record considered as a whole, 29 U.S.C. § 160(e); Universal Camera Corporation v.

NLRB, 340 U.S. 474, 490-91 (1951). The record to be considered includes the ALJ's findings, and the Board's reversal of the ALJ's decision requires that our review be more searching. Doug Hartley, Inc. v. NLRB, supra, 669 F.2d at 581.

The quantum of evidence required to support the Board's decision is greater when the ALJ, on the basis of the witnesses' demeanor, made credibility determinations contrary to those of the Board. Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1078 (9th Cir. 1977). In Penasquitos, this court drew a distinction between credibility determinations based on the observed demeanor of the witnesses and inferences drawn from the evidence itself. While the ALJ's ability to observe at first hand the witnesses' demeanor entitles his credibility determinations to deference, the Board's experience and expertise

require that deference be given the derivative inferences it draws from the evidence.

In this case, the Board departed from the ALJ's decision in both respects. The Board accepted the testimony of the mud crew respecting the reasons given by Buffington for the discharge which the ALJ had rejected on considerations of "demeanor and fervor." The ALJ's rejection of the testimony, however, is entitled to little deference since the testimony is unrefuted. Buffington, though available, was not called by Zurn as a witness.

The Board and the ALJ also differed on the inferences to be drawn from the evidence respecting the motive for the discharges. The ALJ found the General Counsel's interpretation of the events to be improbable, holding that Zurn's justified dissatisfaction with the admittedly poor quality of the pour fully explained the

discharges. The Board, on the other hand, concluded that the conflicting explanations for the discharges given by Zurn's witnesses, the lack of involvement of some of the discharged men in the pour work, Zurn's own responsibility for inoperable equipment, the failure to discharge the responsible working foreman, and the generally satisfactory work of the crew supported the inference that the asserted reason for the discharge was a pretext. Considering the record as a whole, we conclude that there was substantial evidence to support the Board's decision.

Zurn advances several other arguments criticizing the Board's order. Zurn contends that the Department of Labor, not the NLRB, has exclusive jurisdiction over employee safety matters. This argument is without merit. The Board has jurisdiction to investigate unfair labor practices, which include discharges based on protected

activity such as voicing safety complaints; that the employees may also have had other rights or remedies under the Occupational Health and Safety Act does not divest the Board of jurisdiction. See, e.g., Whirlpool Corp. v. Marshall, 445 U.S. 1, 17-18 n.29 (1980). Zurn also argues that a grievance settlement made after the discharge should be given great weight. While private grievance and arbitration procedures are preferred methods of resolving labor disputes, the Board may in its discretion choose not to defer to such settlements if, in its judgment, the public interest would not be served by doing so. See, Carey v. Westinghouse Electric Corp., 375 U.S. 261, 270-71 (1974). Finally, Zurn argues that Buffington's remarks are free speech protected by the First Amendment and the Act. This

argument is frivolous. Neither the Constitution nor the Act are meant to shield employers from unlawfully threatening discharge.

The petition for review is denied. The Board's order is affirmed and will be enforced.

FOOTNOTES

1/The act states in relevant part:

> It shall be an unfair labor practice for an employer--
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 (29 U.S.C. § 157). . . .

29 U.S.C. § 157 states in relevant part:

> Employees shall have the right to self-organization, . . . and to engage in other concerted activities for the purpose of . . . mutual aid or protection. . . .

2/Witnesses testified differently as to the scope of Buffington's remarks. Kissler and Wells of the mud crew and Safety Supervisor Seaman testified that Buffington expressed annoyance with employee complaints about the safety skip; crew members Stedham and Pendergrass testified that Buffington's remarks encompassed safety matters beyond the skip. Buffington was not called by Zurn as a witness, nor was he questioned about his comments at the safety meeting when called as an adverse witness by the General Counsel.

3/While the Administrative Law Judge found that there was no evidence that Buffington knew of the crew's refusal to begin work, the Board concluded otherwise.

4/There was conflicting evidence as to who made the termination decision. Project manager Stamp and Buffington testified that the decision was solely Stamp's; yet in his affidavit Buffington averred that he alone had made the decision, without consulting Stamp. There also was testimony that management offered different reasons for the discharges, one being poor vibration at the August 15 pour, and others being other bad pours on August 3, 12, 15, 16, and 17.

5/Crew member Wells testified that Buffington referred to complaints "about the project site, about the safety skip . . . and just general complaints." Crew members Jones and Pendergrass testified that Buffington specifically referred to employee "commotion" and "complaints" about safety.

6/The distinction between pretextual and dual or mixed motive discharges is irrelevant for purposes of this analysis. See, Lippincott Industries, Inc. v. NLRB, 661 F.2d 112, 114-15 (9th Cir. 1981).

7/In Mt. Healthy, plaintiff, an untenured school teacher, alleged that the school board's refusal to renew his contract violated his rights under the First and Fourteenth Amendments. The school board's action had been based on two grounds: (1) plaintiff's release to a radio station of an internal memorandum, which was clearly protected activity, and (2) his use of obscene language and gestures, which was not protected. The lower courts held that since protected activity played a substantial part in the school board's decision, plaintiff was entitled to reinstatement. The Supreme Court reversed,

stating that the rule of causation used by the lower courts "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." 429 U.S. at 285. It went on to hold as follows:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"--or, to put it in other words, that it was a "motivating factor" in the [school] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the [school] Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

429 U.S. at 287.

8/ The Board stated:

> [We] shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is

> established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Wright Line, A Div. of Wright Line, Inc., supra, 250 N.L.R.B. at 1089.

9/Other courts of appeal have approved the Wright Line rule, although the First and Third Circuit courts alone have written at length on the rule and its ramifications.

The Second Circuit has not examined the burden shifting part of the Wright Line rule, although it has accepted the Wright Line decision's definition of pretextual justification, NLRB v. charles Batchelder Co., Inc., 646 F.2d 33, 39 (2nd Cir. 1981).

The Fourth Circuit, in a recent dual motive case, found it unnecessary to decide whether the Wright Line rule was an appropriate one. NLRB v. Burns Motor Freight, Inc., 635 F.2d 312, 315 (4th Cir. 1980).

The Fifth Circuit recited the Wright Line rule without comment in NLRB v. Robin American Corporation, 654 F.2d 1022, 1025 (5th Cir. 1981), and in NLRB v. Charles H. McCauley Associates, Inc., 657 F.2d 685, 688 (5th Cir. 1981). In Red Ball Motor Freight, Inc. v. NLRB, 660 F.2d 626, 627-28 (5th Cir. 1981), cert. denied, 50 U.S.L.W. 3933 (May 24, 1982), it approved of the rule, rejecting without analysis an employer's challenge to the rule's burden shifting.

The Sixth Circuit specifically approved the Wright Line burden shifting rule in Borel Restaurant Corporation v. NLRB, No. 80-1785 (6th Cir. May 3, 1982). The Wright Line rule was cited with approval in NLRB v. Consolidated Freightways Corp., 651 F.2d 436, 437-38 (6th Cir. 1981), in NLRB v. Allen's I.G.A. Foodliner, 651 F.2d 438, 441 (6th Cir. 1981), in NLRB v. Lloyd A. Fry Roofing Co., Inc. of Delaware, 651 F.2d 442, 446 (6th Cir. 1981), and in Charge Card Association v. NLRB, 653 F.2d 272, 275 (6th Cir. 1981).

The Seventh Circuit mentioned Wright Line in Sullair P.T.O., Inc. v. NLRB, 641 F.2d 500, 504 (7th Cir. 1981), and explicitly approved the Wright Line rule in Peavey Co. v. NLRB, 648 F.2d 460, 461 (7th Cir. 1981). Accord, NLRB v. Eldorado Manufacturing Corporation, 660 F.2d 1207, 1213 (9th Cir. 1981).

The Eighth Circuit approved the Wright Line rule and rejected the First Circuit's criticisms of the burden-shifting approach in NLRB v. Fixtures Manufacturing Corp., 669 F.2d 547, 550 and n.4 (8th Cir. 1982), finding that the Board's rule was well within the latitude it should have in structuring its fact-finding process.

The Supreme Court, although aware of the conflict among the circuits, has recently declined to resolve this issue. Red Ball Motor Freight, Inc. v. NLRB, ___ U.S. ___, 50 U.S.L.W. 3933 (May 24, 1982) (White, J., dissenting) (denial of certiorari).

10/Section 10(c) of the Act, 29 U.S.C. § 160(c), states in relevant part:

> If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

The Board's Wright Line decision recognizes that the burden of persuasion should remain with the General Counsel, and attempts to resolve the apparent conflict between the Mt. Healthy rule and the statutory mandate with this footnote:

> It should be noted that this shifting of burdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifting burden merely requires the employer to make out what is actrually an affirmative defense . . . to overcome the prima facie case of wrongful motive. Such a requirement does not shift the ultimate burden.

251 N.L.R.B. at 1088, n.11.

11/As the court put it in Behring:

> The shifting burden of persuasion undermines the "but for" test and reintroduces the confusion which

> Wright Line purported to eliminate. To understand why, it is only necessary to realize that in establishing a prima facie case, the General Counsel need not prove that anti-union discrimination was the "real cause" of the employee's discharge. Instead, the Wright Line procedure only requires the General Counsel to show that anti-union animus was "a" motivating factor in the employer's decision. If the employer then proffers a legitimate reason for its action, but does not do so with enough weight to carry the burden of persuasion, the Board would rule that the § 8(a)(3) charge had been proved. This would be so despite the fact that two factors -- neither outweighing the other -- had been advanced as causes, and the Board never determined which was the real one. As such, the procedural aspect of the rule is plainly at odds with the "but for" test.

___ F.2d at ___.

This court's opinion in Doug Hartley, Inc. v. NLRB, supra, 669 F.2d at 581 (9th Cir. 1982), appeared to adopt this approach:

> Whereas previously, the General Counsel bore the burden of proving that protected union activity was the "dominant" or "moving" cause for the discharge, under Wright Line, and Nevis Industries, the General Counsel bears only the initial burden of showing that protected activity was "a motivating factor" in the discharge. The burden then

> shifts to the employer to prove that he would have discharged the employee absent the protected activity.

In Doug Hartley, however, the court denied enforcement on the ground that on the record as a whole there was not substantial evidence to support the Board's finding that the employer's reasons for the discharge were pretextual.

12/One judge of the court has recently asserted even more stongly that "the language of the statute as well as its legislative history seem clear . . . . These indicate quite clearly that the Board, not the employer, must bear the overall burden of showing a violation of the Act." NLRB v. Transportation Management Corp., ___ F.2d ___, 93 Lab. Cas. (CCH) ¶13,385 (1st Cir. April 1, 1982) (Breyer, J., concurring).

13/See footnote 10, supra. The second sentence quoted was added by the 1947 amendment.

14/

> Mr. PEPPER. Mr. President, turning to page 34 of the conference committee print, the conference has added the following language to the Senate bill:
>
> > No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

That looks like a very simple and innocent provision. It may seem on its face to be a very proper provision, for it appears only to give the employer the right to discharge a worker for good reason. But this is what the provision does: Under the present law a worker may be discharged by his employer for cause, but the Board may go into the real reasons for the discharge, and if the Board finds that although cause was given as the excuse, the real reason was the fact that the worker was trying to organize a union or trying to join a union, the Board may set aside the act of the employer and require the reinstatement of the worker upon that evidence. But this language allows a worker to be discharged because of union activities, although that may be only a concurrent cause of discharge.

Mr. TAFT. Mr. President, will the Senator yield?

The PRESIDING OFFICER. Does the Senator from Florida yield to the Senator from Ohio?

Mr. PEPPER. If the Senator will allow me to finish this statement, so as to make the point clear, I shall then be glad to yield.

In other words, if an employer has been allowing workers to smoke in a prohibited area, if he has been allowing workers to show up late for work, if he has been letting them quit ahead of time at the end of the day, or violate any other rules, yet if a given employee, because he has been engaged in union activities which the employer does not like, is

selected out of the crowd and discharged for violating a rule, and no one else is discharged for violating the rule, or if it can be shown that the real motivating reason which caused the employer to fire the worker was his union activities, if cause existed it would be a basis for discharge, and this provision would forbid the Board to reinstate the worker. As a practical matter, that is the effect of that language.

I now yield to the Senator from Ohio.

Mr. TAFT. I think the Senator is completely mistaken. That is not all the effect of this language. It merely states the present rule. If a man is discharged for cause, he cannot be reinstated. If he is discharged for union activity, he must be reinstated. In every case it is a question of fact for the Board to determine.

The House language provided that the burden of proof should be on the employee to show that he was not discharged for cause. The Senate conference took the position that the question was whether he was discharged for cause and that the burden of proving that cause should be on the employer, because the information is in his hands. So we did not accept the House provision. All this language does is simply to say exactly what the present rule is. If the Board finds that the man was discharged for cause, that is one possible outcome. If it finds that he was discharged for union

activitiy, that is the other outcome. The Board must determine the facts in every case. For years it has had to determine in every case whether a man was discharged for cause of for union activity. In my opinion, this language in no way changes the existing provision of law after the modification which we forced in the House provision.

Mr. PEPPER. Let me comment on what the able Senator from Ohio has said. If it were not intended to change the existing law, why was anything placed in the conference report on the subject?

Mr. TAFT. Let me say why. When we have a conference with the House and the House yields on all the major points, if the House conferees want certain language in, and the language does not do any more than state the existing law, it is a little hard to refuse to put it in. That is why we put it in. For the purpose of the Record, I am glad to make that statement, because there is no intention whatever to change the existing law on this particular question.

Mr. PEPPER. I submit the further inquiry, Why did the House put it in?

Mr. TAFT. Mr. President, will the Senator yield?

Mr. PEPPER. Everyone knows that the House was trying to write the strongest bill it could write. Why did the House put it in if it did not intend to do something to tighten up the present law?

Mr. TAFT. When the House put it in it wanted to shift the burden of proof to the employee. That is why it was put in.

Mr. PEPPER. Exactly.

Mr. TAFT. We said, "We will accept this language if you will eliminate the other." Naturally the House conferees wanted to show that some of the House language was preserved. In general they accepted the entire basis of the Senate bill and the Senate language. What we did here, in effect, was to say, "If you will modify the language so that it does not change the existing law, we will accept it, and you can point to it as one of the instances in which the House language instead of the Senate language was accepted."

Mr. PEPPER. We have an admission from the Senator from Ohio that the language was intended to mean something. It was intended to shift the burden of proof from the employer to the employee.

Mr. TAFT. Mr. President, will the Senator yield?

Mr. PEPPER. I yield.

Mr. TAFT. Of course, the Senator understands that that part of the House language was taken out.

Mr. PEPPER. Yes. However, I wish to quote from the conference report, and I hope Senators will attend what I am about to quote. I suggest that the result of the conference report is to leave the interpretation of the language exactly as the House intended it. Let us see if that is correct. I read from page 55 of the conference report:

(10) The House bill also included, in section 10(c) of the amended act, a provision forbidding the Board to order reinstatement or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged for cause. The Senate amendment contained no corresponding provision. The conference agreement omits the "weight of evidence" language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transmit union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activites, or for other cause (see Wyman-Gorham v. N.L.R.B., 153 Fed. (2) 480), will not be entitled to reinstatement. The effect of this provision is also discussed in connection with the discussion of section 7.

That shows that the Senate conference agreed to the elimination of the words "weight of evidence," because they do not use those words which are necessary to accomplish

the effect which the House sought to achieve. They say that under the rules of the Board itself the Board had to find by a preponderence of the evidence, and therefore there was not any need to put in the words of the House; but they do not disaffirm the purpose of the house, which the Senator from Ohio has acknowledged this afternoon.

What I am saying, Mr. President, is that if an employer has a union employee of whom he wants to get rid, all he has to do is to snoop around and find him violating some rule or regulation or prohibition, and then fire him in spite of the fact that he does not fire anyone else for the same reason; in spite of the fact that the real reason for the discharge of the worker is the fact that the employer dislikes his activities with respect to the union, which may be perfectly legal under the provisions of the bill. There again, Mr. President, the burden of proof is shifted. In other words, instead of leaving it up to the Board to put the burden of proof on the employer, the burden of proof is put on the employee, which makes it just a little harder for the employee to get the protection that the law was intended to afford.

Again, Mr. President, I remind the Senate that that is only one single provision of the bill, although many of them are iniquitous. It is a cumulative affair. Everywhere we turn there is a dagger or a nail or a spike to be stuck into the body of

labor to make it less effective in the future than it has been in the past.

Mr. TAFT. Mr. President, will the Senator yield?

Mr. PEPPER. I yield to the Senator from Ohio.

Mr. TAFT. The conference report does not quite say what the Senator from Florida suggests. The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. that is the present rule and the present practice of the Board. The Board will have to determine--and it always has--whether the discharge was for cause or for union activity, and the preponderance of the evidence will determine that question. The mere fact that there may be a little cause or real reason would not in any way lead the Board to refuse to give the employee reinstatement and back pay.

Mr. PEPPER. I do not desire to prolong the argument, because I wish to conclude. I shall have to let the matter stand on the statement of the Senator from Ohio as to the intention of the House in its

original bill, what I read from the report of the conferees, and the fact that the language to which I have alluded was put in the bill at all, which certainly was intended to have some effect. Here is the importance of it. It is always a difficult matter to determine the real reason of the employer in discharging a worker. There can always be found some sort of excuse if it is desired to find one. If the employer does not give the worker the benefit of the doubt he can always wait until he smokes a cigarette 3 feet before he gets out of the door, or find some error that would constitute cause. The provision shifts the burden of proof to make the worker show he was discharged for union activities, rather than to make the employer show that the worker was discharged for cause.

Bear in mind, please, this provision in relation to another which I previously discussed. That was the provision in the conference report which denies to the Board the right to consider anything the employer said in advance of the act of discharge which mioght have any bearing upon his reason for discharge, and keeping such statement out of evidence unless they contain not only a declaration but an actual threat, implied or expressed. Take those two provisions together, and it will be seen that they add many times to the power of the employer to discharge a worker for some reason that may be dissociated from

cause or relating entirely to the exercise of the workers' rights under the law.

15/Contrary to Senator Taft's statement, the pre-1947 decisions had in fact not been consistent. Some held that the Act placed the burden of proving a legitimate reason for discharge on the employer, NLRB v. Entwistle Manufacturing Co., 120 F.2d 532, 536 (4th Cir. 1941); see also NLRB v. Barrett Co., 135 F.2d 959, 962 (7th Cir. 1943) (employer bears burden of proving that strike would have taken place even if he had not refused to bargain). Some refer to an employer's burden which resembles a burden of coming forward with evidence, see Montgomery Ward and Co. v. NLRB, 107 F.2d 555, 560 (7th Cir. 1939). And some cases held that under the Act the employee (i.e., the General Counsel) bore the burden of proof, see NLRB v. Union Manufacturing Co., 124 F.2d 332, 333 (5th Cir. 1941); Martel Mills Corp. v. NLRB, 114 F.2d 624, 632 (4th Cir. 1940), citing NLRB v. Remington Rand., Inc., 94 F.2d 862, 872 (2nd Cir. 1938). Whether Senator Taft's characterization of the law is technically correct or not, however, is not relevant since the issue of Congressional intent turns on the state of mind of the legislators who participated in or heard the debate.

16/We do not interpret the Board's reference to discipline or other action which would have occurred "absent protected activities" as implying that the employer has an additional burden to prove the absence of a causal relationship between the protected activity and the discipline. The employer's burden is limited to proving

the presence of an independent legitimate ground sufficient for the disciplinary action. As the Court explained in Mt. Healthy:

> But that same candidate ought not to be able, by engaging in such [protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

429 U.S. at 286.

17/ The Board's order states:

> The Board has recently stated in Wright Line, a Division of Wright Line, Inc., 251 NLRB No. 150 (1980), that where the motivation for discharge is at issue, the General Counsel must make a prima facie showing sufficient to support an inference that protected activity by employees was a motivating factor in an employer's decision to discharge. The employer then has the burden of showing that the employees would have been discharged absent that protected activity.

255 NLRB No. 88

FJZ
D-7566
Satsop, WA

UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD

ZURN INDUSTRIES, INC.

and Case 19--CA--11731

ROBERT PENDERGRASS, an Individual

DECISION AND ORDER

On July 16, 1980, Administrative Law Judge James M. Kennedy issued the attached Decision dismissing the complaint in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, requesting review of the record de novo. Respondent filed no cross-exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that Respondent threatened its employees with discharge, and discharged six employees---Robert Pendergrass (the Charging Party), Everette Kissler (the union steward), Tony Wells, Steven Stedham, David Alexander, and Larry Jones, herein "the concrete crew---for their complaint about unsafe working conditions, in violation of Section 8(a)(1) of the National Labor Relations Act, as amended. The Administrative Law Judge recommended that the complaint be dismissed, finding first that Respondent made no threats, and second, that the concrete crew was dismissed for unsatisfactory work, not because of their complaints. We disagree.

Respondent is a construction contractor which, during the time in question, was building a cooling tower for a nuclear power plant in Satsop, Washington. The

employees in question were laborers assigned at all relevant times to the concrete or "mud" crew, meaning that they poured concrete from a concrete truck into forms. There were a number of discrete tasks involved in this: Concrete was loaded from the truck into buckets, which were then emptied onto a chute directed to the forms and, as the concrete was poured into the forms, it was vibrated with machines called vibrators to prevent air pockets from forming and to prevent the concrete from separating.

Respondent, as required by Federal regulations and its contract with the site owner, held weekly safety meetings for employees on the site, unsually [sic] conducted by its safety "supervisor," James Seaman. During the months of June, July, and August, Respondent's employees persistently demanded that Respondent furnish a "safety skip": a 4- by 4- by 8-foot box

that could be attached to a crane and used to rescue injured workers from heights or excavations. Respondent initially furnished a wooden skip, which did not satisfy the employees because they thought it too weak. Respondent then furnished a steel skip, but the employees were still dissatisfied because the skip had no door, no litter, and no first aid kit. After the second skip arrived, it was discussed at an August 15 safety meeting of all Respondent's employees at the site. When this discussion became heated, Respondent's site superintendent, Kester Buffington, interrupted the meeting and said that he was "tired of hearing about safety and especially about the safety skip," that anyone with any complaint should talk to the steward about it, and that if anyone did not like that procedure there would be two checks waiting for him in the office,

meaning they were discharged. When Buffington had spoken, the meeting broke up.

Immediately after this meeting, the concrete crew went to the site of that day's "pour," where they found that the forms were not yet complete. Specifically, ladders and handrails were not in place and at least one metal bar called a rebar was not capped. The crew concluded that the job was not safe, and called this to the attention of Seaman. Seaman, who did not have authority to stop work, went to find the safety supervisor for Ebasco, a construction management contractor overseeing the entire project. While Seaman was gone, the concrete crew decided among themselves that they would not work on the pour until they were sure it was safe. While waiting, they were observed by Superintendent Buffington and Ray Lewis, a quality control supervisor for Ebasco. Lewis approached

them and told them that Buffington wanted them to begin work; they responded that they were not going to work until they heard from the Ebasco safety man. The Ebasco safety supervisor agreed that the forms were unsafe, and the pour was delayed several hours.

Two days later, on August 17, the forms were removed from the August 15 pour, revealing numerous serious defects. That afternoon, the six members of the August 15 concrete crew were discharged. When they learned of their discharge, they confronted Buffington in his office. Buffington told them that they were being fired because of the poor results of the August 15 pour, which Buffington said was due to poor vibration. Two of the six, Stedham and Wells, objected, saying that they had not been engaged in work related to vibration on the August 15 pour.

In dismissing the complaint, the Administrative Law Judge concluded that "the only probable scenario" was that the six-man concrete crew was discharged because of the poor results of the August 15 pour. He also concluded that Buffington did not threaten discharge for complaining about safety when he spoke to the safety meeting on the morning of August 15. We disagree with these conclusions.

During the August 15 safety meeting Buffington came out of his office adjacent to the meeting place and spoke in an "annoyed" tone. In pertinent part, Buffington said:

> We are tired of hearing all this commotion about safety and . . . about this safety skip. We have a skip now and if anybody doesn't like it we have checks for them.

The Administrative Law Judge termed these remarks "totally understandable" in the

circumstances.[1] He noted that Respondent had already "complied" with employee requests for a skip, and that one employee at the safety meeting had said, "To hell with the way management wants that skip, we need it for safety, it's the way we want it, not the way they want it." This remark the Administrative Law Judge termed an "insubordinate seizure of safety authority." However, an employee is not insubordinate to express an opinion on occupational safety---one of the most important

---

[1]The Administrative Law Judge found that Buffington's remarks that morning were addressed only to complaints about the safety skip, not to safety generally, and that the contrary recollections of several witnesses were "exaggerations." The record testimony does not support that conclusion. In addition, either version would establish Buffington's hostility to employee complaints at that time. Buffington, testified only as an adverse witness for the General Counsel. He was not recalled to deny any of the subsequent testimony. Unlike the Administrative Law Judge, we draw an adverse inference from the lack of a specific denial. See Martin Luther King, Sr., Nursing Center, 231 NLRB 15, fn. 1 (1977).

conditions of employment. Nor does this expression lose its Section 7 protection because it may have been intemperate. See Fall River Savings Bank, 247 NLRB No. 88, fn. 3 (1980); American Telephone & Telegraph Co., 211 NLRB 782, 783 (1974); Houston Shell and Concrete Co., A Division of McDonough Co., 193 NLRB 1123, 1129 (1971).

The Administrative Law Judge further found that Buffington was, in any case, merely telling employees to direct their complaints through propr channels. But weekly safety meetings were proper channels, and the crew's action later that day regarding the unsafe forms were also directed through proper channels: Steward Kissler, Seaman, and the Ebasco safety supervisor. We conclude that Buffington, by his remarks at the safety meeting, threatened employees with discharge for engaging in concerted activity for their

mutual aid or protection, a right guaranteed by Section 7, and thus violated Section 8(a)(1) of the Act.

Concerning the discharge of the concrete crew, the Administrative Law Judge concluded that it was not motivated by the safety concern voiced by the crew at the August 15 pour site, hence there was no violation of the employees' Section 7 rights. The Board has recently stated in Wright Line, A Division of Wright Line, Inc., 251 NLRB No. 150 (1980), that where the motivation for discharge is at issue, the General Counsel must make a prima facie showing sufficient to support an inference that protected activity by employees was a motivating factor in an employer's decision to discharge. The employer then has the burden of showing that the employees would have been discharged absent that protected activity.

Contrary to the Administrative Law Judge, we find that the General Counsel has made a prima facie showing. The Administrative Law Judge found improbable the fact that Buffington, at the August 17 discharge confrontation, said that there had been too much "commotion" about safety from the concrete crew, because the only "commotion" about safety occurred at the recent weekly safety meeting. The Administrative Law Judge further found that, in any case, the impact of the crew's refusal to work until the site was approved safe to work was "submerged" by the fact that concrete could not have been placed until the forms were finished. We find the Administrative Law Judge's treatment of the testimony of these matters speculative and do not adopt it.

Respondent's exhibits show the "15 Aug '79" pour was originally scheduled for "8:30," Stedham testified that it was

"rescheduled at 10 the first time" and Pengergrass testified that the pour was actually started that afternoon about 1 o'clock. Buffington, though knowing the forms were unfinished, ordered the concrete crew to proceed. The crew contacted Seaman to protest the unsafe conditions created by the incomplete form, and Seaman in turn contacted the Ebasco representative. As a result, the crew was sent to an early lunch while handrails were being provided.[2]

We further find that Buffington was clearly aware of these developments[3] and, contrary to the Administrative Law Judge,

---

[2]The Administrative Law Judge concluded that, while the crew members were prepared to refuse to work, they were not "forced to refuse" to work on the forms and therefore did not refuse to do so. Be that as it may, what is important is that the crew initiated the delay of work.

[3]Buffington was aware that the concrete crew had refused to do the pour, and he testified that the refusal occurred "awfully close to noon I would imagine. I know it was a good 45 minutes or getting close to an hour from what the scheduled

find nothing improbable in the employees' testimony that Buffington, at the time of discharge, mentioned "commotion" about safety as the cause of the crew's discharge. In reaching this result we note that the Administrative Law Judge referred to employee Wells' testimony, which he considered "closest" to the truth, as "not

---

Footnote 3 continued

pour was to have been made . . . ." Later, the Administrative Law Judge asked Buffington the sequence of events on August 15 with respect to the forms for that pour, to which Buffington answered:

> The first that it was brought to my attention, and somebody came to me, I don't know who, but possibly one of the foremen, possibly Jim Seaman, and said the pour crew isn't going to get on there without a handrail. . . . I immediately went to Vernon Lee, the carpenter foreman, and explained we were going to have to have handrails on there. . . . The first time I was aware there was any controversy on handrail was now, I guess there was more I didn't get involved in, and then they came to me and said they weren't going to get on there. . . ."

describ[ing] anything like Buffington's supposed admission" as reported by Stedham, Pendergrass, and Jones. However, Wells' testimony on this point clearly indicates that Buffington referred to the crew's complaints as a basis for the discharge and in fact is quite similar to that of Stedham, Pendergrass, and Jones, all of whome were sequestered at the hearing.[4] Thus, Wells, in response to the General Counsel's question whether he had heard anything regarding complaints during the discussion between Stedham and Buffington:

> Mr. Buffington had stated to Steve Stedham that the higher up offices have been hearing complaints from the concrete crew and that he was told to fire the whole crew.

---

[4]By contrast, the site superintendent, Buffington, had been in the courtroom during the testimony of Project Manager Stamp. These two were the first witnesses, called by the General Counsel as adverse witnesses. See Fed. R. Evid. 615; Unga Painting Corporation, 237 NLRB 1306, 1311 (1978).

Stedham protesting his discharge to Buffington because he did not run a vibrator, was told by Buffington:

> He said it came from above . . . he had been hearing too much commotion about safety from the crew and that he and Stamp thought they could do better with a whole new crew. And I said that it wasn't the crew it was the way Mr. Buffington scheduled pours way ahead of time, and the equipment they had, which was lousy, they'd need more than a whole new crew.

Pendergrass, who heard Buffington respond to Stedham when he protested that he did not even run a vibrator:

> And Kester [Buffington] said, "Well, we have been hearing a lot of commotion from the concrete crew about safety and it came down from George [Stamp] to get rid of all of you and so I did."

Jones, concerning what Buffington said to him and Steve Stedham when they protested that they weren't using the vibrators:

> Well, you've got me, the reason you were fired is because you were complaining about safety, and people above my head found out about it. And I had to let you go.

The Administrative Law Judge, in countering the obvious problem of Buffington's lack of denial of the testimony quoted above,[5] made a passing referenc to "considerations of demeanor and fervor" and then concluded that Pendergrass and Stedham---whom he was not discrediting on the basis of "deliberate prevarication"---appeared to him as "excessively sensitive to the safety skip matter," as "aware of the agreement not to work on August 15 and . . . ready to ascribe an evil motive to nearly anything negative which occurred." He added that Jones was "even worse" in this regard,[6] and concluded: "That

---

[5]See fn. 1, above.

[6]We cannot agree that Jones' testimony showed "bias on its face." Rather it suggests that Jones wanted to hear Buffington admit that he was discharging the crew for their complaints, as Jones knew his rights and was prepared to enforce them. (See ALJD, sl. op., p. 10, ll. 3--10, 20--21.)

Buffington ever uttered such an admission is most doubtful."

The Administrative Law Judge seems to have confused demeanor with fervor for safe working conditions and, based on his own speculation in that regard, has excused the failure of Respondent to question Buffington. On this record, we are not prepared to conclude that the employees' concern about safety---either as to the skip or the handrails---was excessive, or that their undenied testimony was not credible. The credibility findings we make comport with the record evidence and with the inferences fairly drawn therefrom. See El Rancho Market, 235 NLRB 468, 470 (1978). We therefore find that Buffington indicated, during his August 17 discussion with the discharged employees, that they were discharged because of their complaints about safety.

Having concluded that General Counsel has made a prima facie showing that the motive of Respondent in discharging the crew was its activity in complaining about safety with respect to the handrails, we turn to Respondent's burden of showing that it would have discharged the crew absent the crew's protected request to provide safety.

Although each crewmember received an identical termination slip, stating, "Does not do work to our satisfaction." Respondent advanced conflicting explanations of the discharges, before and during the hearing. Stamp testified that he ordered Buffingtonto fire the crew; while Buffington agreed with that account at hearing,[7] he had said in a pretrial affidavit that he decided to discharge the crew without even consulting Stamp. At different times

---

[7]See fn. 4, above.

Buffington and Stamp cited different pours as the cause of the discharges, including those of August 3, 12, 15, 16, and 17. In his affidavit, Buffington said the discharges were based "solely" on the August 16 pour. Some of these pours included employees who were not discharged, and the results of the last two were not yet known on August 17, the date of discharge. Though Stamp claims to have observed improper work by the crew, he admits they were not warned. Respondent's inconsistency leads us to draw an unfavorasble inference against it for inability to settle upon an explanation for the discharge of the crew. See A. J. Krajewski Manufacturing Co., Inc. v. N.L.R.B., 413 F.2d 673, 675 (1st Cir. 1969), where the court noted "especially the Company's inability to adhere with consistency to any explanation of its action"; also N.L.R.B.

v. Teknor-Apex Company, 468 F.2d 692, 694 (1st Cir. 1972).

As earlier noted, the Administrative Law Judge concluded that the only "probable scenario" was that the crew was discharged on August 17 because of the results of the August 15 pour. However, the Administrative Law Judge also found---and the record clearly supports the facts---that although vibration of concrete is necessary to a satisfactory pour, two of the three vibrators used by the crew were not functioning on August 15, and Respondent thereafter was forced to purchase replacements.[8] Respondent knew that the vibrators were not functioning properly, but nevertheless continued the pour. In addition, the entire crew of six was discharged, though

---

[8]Ebasco's report on the August 15 pour (Pour 8B) notes that the defects were typical of pours where the concrete falls too far, which it did on August 15 because the tremie chute was broken. (See ALJD, sl. op., p. 7, ll. 24--27).

only two of them operated vibrating equipment on that pour, and the foreman who supervised and worked with the crew was not discharged or even reprimanded.[9] We further note that the record contains evidence that the concrete crew's work was generally satisfactory. Under these circumstances, we find that Respondent's asserted reason for the discharges was a pretext.

On this record, the discharge of the entire crew flowed from the crew's specific safety complaints of August 15 and the accompanying protest and delay of work,

---

[9]The Administrative Law Judge concludes his Decision by noting a grievance settlement several weeks later: One crewmember was rehired and the rest were judged suitable for rehire; he finds that the employees' union thereby admitted some "fault" on the employees' part, and that Respondent admitted some "unfairness" on its part. The Administrative Law Judge thus implies that this settlement is evidence that Respondent did not violate the Act. We cannot agree.

concerted activity protected by Section 7 of the Act, which we find were the true causes of the discharges. Accordingly, we find and conclude that Respondent has violated Section 8(a)(1) of the Act.

Conclusions of Law

1. Zurn Industries, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Laborers Local No. 374, affiliated with the Washington and Northern Idaho District Council of Laborers, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to discharge employees for voicing their opinions concerning job safety issues, Zurn Industries, Inc., violated Section 8(a)(1) of the Act.

4. By discharging employees Robert Pendergrass, Everett Kissler, Steven Stedham, Tony Wells, Larry Jones, and David Alexander on August 17, 1979, Zurn Industries, Inc., violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent Zurn Industries, Inc., engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order Respondent to cease and desist therefrom and from engaging in like or related conduct, and to take certain affirmative action to effectuate the policies of the Act.

Respondent shall be ordered to offer Robert Pendergrass, Everett Kissler, Steven Stedham, Tony Wells, Larry Jones, and David Alexander immediate reinstatement to their

former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings or other benefits they may have suffered by reason of their unlawful discharges. Backpay and interest thereon shall be computed in the manner prescribed in F. W. Woolworth Company, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 651 (1977).[10]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby

---

[10]See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962). Member Jenkins would compute interest on the backpay in accordance with his partial dissent in Olympic Medical Corporation, 250 NLRB No. 11 (1980).

orders that the Respondent, Zurn Industries, Inc., Elma, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees for engaging in concerted activity for their mutual aid or protection, by expressing their concerns for safe working conditions, either in weekly safety meetings, or at other reasonable times and places.

(b) Threatening its employees with discharge for engaging in concerted activity for mutual aid or protection by expressing concern for safe working conditions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Offer Robert Pendergrass, Everett Kissler, Steven Stedham, Tony Wells, Larry Jones, and David Alexander immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings or other benefits they may have suffered as a result by paying them a sum equal to what they would have earned absent the unfair labor practice, less any net interim earnings, plus interest.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze

the amount of backpay due under the terms of this Order.

(c) Post at the Satsop, Washington, site of Zurn Industries, Inc., copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by an authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

---

[11]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C. April 6, 1981

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

YOU HAVE THE RIGHT, under the National Labor Relations Act, as amended, to act together on your concern for safe working conditions, and in other respects for your mutual aid or protection.

The National Labor Relations Board has found, after a hearing, that we violated the National Labor Relations Act by threatening our employees with discharge for complaining about safety conditions at their worksite, and by discharging Robert Pendergrass, Everett Kissler, Steven Stedham, Tony Wells, Larry Jones, and David Alexander on August 17, 1980.

We hereby notify our employees that:

WE WILL NOT discharge employees for expressing their concerns for safe working conditions in weekly

safety meetings or at reasonable times and places.

WE WILL NOT threaten any employee with discharge for expressing concern about safe working conditions.

WE WILL offer immediate and full reinstatement to Robert Pendergrass, Everett Kissler, Steven Stedham, Tony Wells, Larry Jones, and David Alexander to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make whole Pendergrass, Kissler, Stedham, Wells, Jones, and Alexander for any loss of earnings or other benefits each may have suffered from the time of discharge

to the time of reinstatement, less net earnings during that period, plus interest.

ZURN INDUSTRIES, INC.

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 2948, 915 Second Avenue, Seattle, Washington 98174, Telephone 206--442--7472.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

ZURN INDUSTRIES, INC.

and Case No. 19-CA-11731

ROBERT PENDERGRASS, an Individual

Mark E. Brennan, Esq., Seattle, Wash., for the General Counsel.
William B. Moore, Esq. of Ferguson & Burdell, Seattle, Wash., for Respondent.

DECISION

Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: This case was tried before me at Seattle, Washington on February 14 and 15, 1980, pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 19 on October 25, 1979, 1/ and which is based upon a

---

1/ All dates herein refer to 1979 unless otherwise indicated.

charge filed by Robert Pendergrass, an individual, on September 4. The complaint alleges that Zurn Industries, Inc. (herein called Respondent) has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act).

Issues

Whether or not Respondent on August 17 discharged its entire concrete placement crew because some of its members had engaged or had threatened to engage in a work stoppage over safety matters and whether the discharge had been preceded by a threat to discharge employees over safety complaints.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully

considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Respondent's Business

Respondent admits it is a Pennsylvania corporation engaged in the engineering and construction business and having an office located in Elma, Washington and a jobsite in nearby Satsop. It further admits that during the past year, in the course and conduct of its business it has purchased and received goods and materials valued in excess of $50,000 from suppliers outside Washington State. Accordingly it admits, and I find it to be an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The parties stipulated, and I find, that Laborers Local No. 374, affiliated with the Washington and Northern Idaho District Council of Laborers, AFL-CIO, (herein called the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background and Participants

Respondent has contracted with the Washington Public Power Supply System (WPPSS) to design and construct the cooling towers for a nuclear power plant located near Satsop, Washington. Other portions of the plant are being constructed by their firms and all of the construction companies are under the direction of Ebasco Services, Inc., which has a contract with WPPSS to oversee all construction. Ebasco is the construction manager and performs the site's necessary administrative functions.

Respondent has recognized the Union as the representative of its laborers and has recognized other craft unions as well, including a local of the Ironworkers Union. At the time in question Respondent employed between 80 and 100 employees including approximately 20 to 25 laborers. Of these approximately 6 were assigned to the concrete placement crew, commonly called the "mud crew."

Respondent's hierarchy from the bottom up is: Don Scott, mud crew foreman; Henry Chavie, laborer foreman; Kester Buffington, field superintendent; and George Stamp, project manager. Stamp was the highest official present at the site and reported to Respondent's Tampa, Florida headquarters. Others who reported directly to Stamp were Respondent's safety supervisor James Seaman and members of Respondent's quality control department.

The mud crew regularly consisted of Pendergrass, Everett Kissler, the union steward, David Alexander, Tony Wells, Larry Jones and Steven Stedham.

At the time of the transactions to be described herein, August 1979, Respondent was in the process of placing concrete for the water inlet trench and the foundation of the cooling tower which will eventually rise to the height of 495 feet. The foundation ring is approximately 420 feet in diameter. The water inlet joins the tower at a "header" which is a large concrete platform containing a tunnel for the hot water. In addition to serving as the header for the inlet, the platform was also to serve as the base for the tower crane to be used during construction. It is fair to say, and no party disagrees, that the quality of the concrete work to be performed at this stage of construction

must meet the design specifications; if not, the structural integrity of the crane base and surrounding foundations would be jeopardized.

During the course of construction, and pursuant to its agreement with WPPSS, Respondent holds weekly safety meetings with its crews. All meetings occur on Wednesdays before beginning work; during a month three are limited to each individual craft while one is an all-craft meeting.

One of the topics which had been regularly discussed at the safety meetings was the need for a "safety skip."[2/] the witnesses are all in agreement that Respondent was not obligated by safety rules or

---

2/Some of the witnesses referred to it as a "safety 'skiff'" as do the General Counsel and the transcript. However it is clear that the proper name of the instrument is "skip"--a basket or a bucket for carrying men, here injured men. See Webster's Third New International Dictionary (1963).

regulations--whether promulgated by state or federal safety agencies--to provide such a device. Nonetheless it appears that on large construction projects such as this safety skips are common. Indeed, Ebasco Services had a standard design for one. As a result of safety meeting requests which had begun in May, Respondent built a wooden skip. However, because it was not constructed of steel, like Ebasco's design, many employees didn't trust it, believing it not strong enough. It was approximately 4 x 4 x 8 feet and contained an entry door. As a result of the additional complaints Respondent ordered a steel skip to be constructed in Centralia, Washington. It arrived in mid-August, shortly before the safety meeting of August 15. Although it was approximately the same size as the wooden skip, it did not contain a door and there was testimony that some employees

thought its use would not be limited to rescue purposes.

B. The Safety Meeting of August 15

At 8 a.m. on August 15 an all-craft safety meeting was begun under the leadership of safety supervisor Jim Seaman. He testified that the meeting was not specifically aimed at the safety skip, and that it started out with a discussion of some minor complaints such as a lack of band-aids and torn gloves. At some point he said that he'd heard the new skip was on the way and it wouldn't be very long before it arrived. Pendergrass remembers an ironworker asked for details about the safety skip and Seaman replied it had arrived but he hadn't seen it yet. Another ironworker said it was only a metal box and didn't qualify as a safety skip. Tony Wells remembered Seaman discussing the skip with an ironworker and their discussion dealt with

whether or not it met OSHA standards. Steve Stedham testified that during the meeting Seaman announced Respondent had a safety skip, saying, "I know that you men don't like it, but that's the way the Company wants it." At this point, according to Stedham, an ironworker "spouted out" saying, "To hell with the way management wants that skip, we need it for safety, it's the way we want it, not the way they want it."

Everyone is in agreement that during the discussion regarding the skip, field supervisor Kester Buffington came out of his office which was adjacent to the meeting place and spoke to the group in an annoyed tone.

Pendergrass testified Buffington stepped out in front of Seaman and said, "We are tired of hearing all this commotion about safety and especially about this

safety skip. We have a skip now and if anybody doesn't like it we have checks for them. We have a procedure around [here]. You talk to your steward, your steward talks to your business agent, and your business agent talks to me. If you don't like that we have checks for you, too." Despite this alleged statement, Pendergrass and others conceded that at company safety meetings Respondent encouraged employees to make suggestions and comments. Pendergrass found Seaman "responsive and very amiable" whenever employees made safety suggestions to him.

About this incident Kissler testified Buffington "commented on he'd heard enough about the safety skip and that what they had was what the Company was going to provide for us. [Buffington] said if we didn't like the procedure the Company was taking, that anyone that didn't like it

could pick up their check and head down the road." Wells testified Buffington interrupted Seaman. Wells recalled, "[Buffington said] he had heard enough about the safety skip, that he's been hearing complaints about it for the last month, and that he was sick and tired of hearing it, that there was procedures, proper channels, that you were to go through when you had a safety complaint, and that if he heard any more from anybody else about the safety skip, that if they didn't like the way the project was run, they could go pick up their checks at the window." Stedham testified that after hearing the ironworker speak angrily of the skip, Buffington pointed his finger at the man and said, "I'm damn tired of hearing about safety, especially the safety skip. I don't want to hear no more about it; if you guys don't like the way things are run around here,

I'll get you both your checks and you can do down the damn road."

Seaman recalled Buffington saying he was tired of hearing so much about the safety skip and if the employees didn't agree with the way things were going, there were two checks waiting for them in the office. He denies Buffington said anything about safety complaints generally. He remembers that during the meeting there was a "lot of rhetoric"--a conclusionary statement which I believe to be accurate if it is taken to mean that angry tones were used by those employees who wanted a different style skip.

The General Counsel did not ask Jones for his recollection although he was no doubt present, being scheduled to work shortly as a vibrator man. Neither did the General Counsel ask Buffington for his version when he was called as an adverse witness.

After listening to the versions of the mud crew members as they testified about Buffington's remarks at the safety meeting, I found myself totally unimpressed with the likelihood that Buffington made an unlawful statement. It is apparent, particularly from Stedham, that some members of the ironworker crew were quite angry and at least one of them told Seaman safety matters were solely the concern of employees, not the concern of the employer and that is was the workmen's right to dictate safety terms to Respondent. Clearly that attitude was insubordinate and an attempt to undermine managerial authority. Moreover, the safety skip matter had been before Buffington since May and had been resolved, not once, but twice. Respondent had first built the wooden skip which had been on the job since June. When employees

complained it was not strong enough, Buffington caused another to be built and its imminent arrival had just been announced by Seaman. Thus, from Buffington's standpoint he had complied with two employee requests for a skip and believed the problem to be over. In that context his response that he was "sick and tired of hearing about the safety skip" is totally understandable, particularly where it was being exacerbated by an employee's insubordinate seizure of safety authority. In essence Buffington stated he was no longer going to entertain direct employee complaints about the skip, but would entertain them if they were brought to him through the proper channels, the various union grievance procedures. And, his remark that people could quit if they didn't like the way the Company operated, was simply a response to the ironworker's insubordination. In no way was it a threat to discharge employees for

making safety related complaints. Thus, I conclude, from analyzing the testimony of the General Counsel's own witnesses that the General Counsel did not make out a prima facie case with respect to Buffington's alleged threat to discharge employees for engaging in the protected activity of making safety complaints or speaking of safety matters. Supporting this conclusion is the employees' own testimony that Respondent encouraged safety discussions and responded favorably to legitimate concerns. Their recollection that Buffington's remarks encompassed safety matters beyond the skip are exaggerations and are not credited.

C. The Discharge of the Mud Crew

Immediately after the safety meeting ended on August 15, the mud crew headed down to begin work on pour number 8-B, the inlet header/crane base. When they arrived

they observed that the form was not finished and the carpenter and ironworker crews were still working on it. From the drawings it appears that the concrete for that day was to begin at ground level and rise to approximately 15 feet, the height of the form when finished. Because it had not yet been finished, the form lacked handrails, some of the ladders had not been placed and vertical rebar had not been capped. The crew, particularly steward Kissler, decided it was not a safe workplace. A cement truck had already arrived and the pour was scheduled to begin at 9 a.m. Nonetheless, the crew decided to check with safety supervisor Jim Seaman regarding whether or not work should begin.

Both steward Kissler and Larry Jones saw Seaman nearby and spoke to him about it. Seaman looked the pour over, apparently concluded that the unfinished forms

raised a safety question and told them he would discuss it with Ebasco's safety personnel. He left to do that. In the meantime the crew decided among themselves that they would not work until the hand-rails were up. While they awaited Seaman's return, they observed Buffington upon the ring wall with Ray Lewis, a quality control man. While they waited Lewis came down and told them Buffington wanted them to begin the pour. Wells told him that he was not going to begin because it wasn't safe and Lewis told him "go ahead and swing the bucket out anyway. . . ." According to Pendergrass and Stedham, Wells refused to do so. Wells himself said that he simply told mud crew foreman Don Scott "that he could not start the pour until we hear word from the safety man on whether or not it

was safe." At approximately 11:30, according to Stedham,3/ Seaman told them the pour was not to begin until the rails were up. As a result the crew took an early lunch. When they returned at approximately 1 p.m. the guard rails had been installed in at least one section of the form and they began to pour.

At this point it should be observed that project manager Stamp and Buffington both testified without contradiction that this particular pour was delayed for three reasons: (1) the forms were not ready, (2) the reinforcing iron was not ready, and (3) the iron inserts (anchors) were not installed. Stamp testified that the pour was

---

3/It seems unlikely that it would have taken Seaman from 9 to 11:30 to tell them the pour was to be delayed. I believe Stedham's testimony to be an exaggeration. The delay was probably no more than 15 minutes, for the Ebasco safety people were nearby.

delayed pursuant to a joint decision of Ebasco Services, Buffington and Seaman. He admits he understood that it was the Laborer steward who had raised the handrail issue. He also concedes that the first load of concrete was lost and that a certain amount of overtime was required later that day to make up for the delay. He minimized the latter observation by saying that even without the delay some overtime would have been required anyway. Stamp also testified he did not blame the mud crew for the lost concrete, but on the fact that the forms were not ready.4/

The General Counsel argues from this scenario that I should conclude that the mud crew had engaged in a protected work stoppage to await the correction of certain safety matters and that the discharge which followed 2 days later was principally

---

4/On a project this size one load of lost concrete is no doubt a very minor expense.

motivated by it. I have no difficulty in concluding that the mud crew members concluded among themselves that they would not work on this particular pour until the handrails were installed, the rebar capped and the ladders in place. Nonetheless, it appears to me that nothing out of the ordinary occurred. Steward Kissler, following the proper procedure, pointed out the safety question to the safety supervisor who went to the project overseer, Ebasco. At the same time it is also clear that the forms were not complete. All witnesses are in agreement that the ironworkers and carpenters were still constructing the forms and common sense can only lead to the conclusion that if the forms were not ready for concrete, concrete could not be poured. The reason the rails and ladders were not set was because the forms were not finished. The rails are the

last thing to be installed and the form would not be completed until they were. But aside from that, the absence of finished reinforcing iron and inserts further dictated that the pour not begin.

Thus, even though the mud crew did not want to work on those forms, it does not appear that they were ever forced to refuse. They were prepared to do so, but did not have to, and therefore did not. After Ebasco's and Respondent's management consulted with one another, the crew was sent to an early lunch to await completion of the forms. Finally, I observe that even though the crew made a decision not to go to work until the safety matters were corrected, there is no credible evidence that Respondent was aware of that decision. It is true that Pendergrass and Stedham thought that Jones had refused Lewis' request to go to work, but it does not even

appear that Jones spoke to Lewis. Instead he spoke to Scott and no one has shown Scott to have done anything but remain silent while Seaman spoke with Ebasco. Accordingly, I am unimpressed with the General Counsel's evidence that either Buffington or Stamp were aware of the crew's decision. Even if they were, there is no evidence that they believed the crew's concern caused the delay. The delay was solely attributable to the fact that the forms were not ready for concrete. In addition, they knew that the union steward's safety concern was legitimate.

The pour of August 15, having started on an inauspicious note, continued to sour. During the pour two of the three vibrators broke and the tremie chute (a chute attached to the crane-borne bucket which keeps the mixed concrete from separating while falling) all broke, leaving vibrator man Wells to do the work of two men and

permitting the aggregate to separate on impact. The job was also hampered to some extent by the fact that portions of the form were still being worked on by the ironworkers and carpenters, though frankly I doubt the testimony to the effect that the other crafts interfered significantly. It appears that those crafts were working at some distance from the pour on other sections of the form.

On August 16 another pour was made which required concrete to be placed against a 45 degree hillside. A certain amount of difficulty was encountered with that pour, and there is conflicting testimony with respect to whether or not the vibrators were working properly. I do not deem it necessary to resolve that conflict, though the work is said to have had some bearing on the crew's discharge the following day. Nonetheless, vibratormen were seen on that occasion attempting to move

concrete laterally with the vibrator, an unacceptable practice as it tends to break up the aggregate and causes it to be uneven, thereby affecting its strength.

In the morning of Friday, August 17, the forms for the August 15 pour were removed, revealing for the first time serious deficiencies in the quality of the pour. The north face of the header on that pour was most deficient, containing numerous rock pockets and voids. See R. Exh. 4, pp. 2 and 4, diagrams for the repair order. One void was so bad it actually created a hole through the entire wall. See R. Exh. 7, bottom photo, where to demonstrate the void a reinforcing bar was inserted through the entire foundation. Needless to say, both Respondent's quality control people as well as those of WPPSS were quite alarmed by the poor quality of work. Respondent's quality control office informed Stamp immediately. WPPSS that day wrote a

complaint letter to Resondent, though it was not received for several days.

Respondent's project manager Stamp testified that upon learning of the workmanship he decided to discharge the entire crew. He had had doubts about the quality of work being performed by the crew since an August 3 pour and had had a number of conversations with Buffington about its members.5/ Both Stamp and Buffington agree that they had discussed certain instances involving some members of the mud crew who had expressed reluctance to do other work when pours were not scheduled. While the evidence supporting their conclusions is not totally clear Stedham admitted conduct quite similar while explaining the difficulties the mud crew encountered on the August 15 pour. Stedham

---

5/R. Exh. 5 contains three photographs (two of the same error) with respect to the August 3 pour.

is an experienced concrete worker and considered to be a good vibrator man. Before becoming the leadman and operating the truck chute, as he did on August 15, he had been a vibrator man. When an operable vibrator was obtained to replace one of the broken ones on August 15, laborer foreman Chavie asked Stedham to run it. Chavie's request was no doubt reasonable considering the fact that the other vibrator man, Alexander, was inexperienced and was doing noticeably poor work. Nonetheless, Stedham admittedly refused. That refusal lends credence to Stamp's and Buffington's testimony that mud crew members were reluctant to perform jobs other than their own.

Both Stamp and Buffington testified that the decision to discharge the mud crew was solely made by Stamp on August 17. In addition, at the confrontation which occured that afternoon, Buffington told the

crew that the decision had been made by his superior, which could only mean Stamp.6/

At approximately 3:30 p.m. the concrete crew members received termination notices. Each slip contained a check-mark in the box marked "does not work to our satisfaction."7/ Pendergrass asked Chavie, who had delivered his slip, what the underlying reason for the discharge was. Chavie replied he had been told "poor vibration." Pendergrass and those other members of the crew who had not worked as

---

6/It is true that in his second affidavit Buffington says he was the sole person to make the decision and did not consult Stamp. Nonetheless, in view of statements attributed to him at the confrontation, which are consistent with his testimony before me, I conclude his testimony is the more accurate.

7/All six were also listed as "ineligible for rehire." A stipulation of the parties shows that at a grievance settlement meeting on August 31, Kissler was reinstated as of September 4 without backpay and the remaining termination slips were modified to show the others were eligible for rehire.

vibratormen were incensed. While they agreed that the poor vibration work had occurred on August 15, they did not believe they should be blamed for it, principally because they had not operated the vibrators; secondly, because they believed that the poor vibration was in large part due to Respondent's failure to supply the vibratormen with operable equipment and thirdly, because they knew Respondent was aware of Alexander's inexperience.

Although the crew did not descend upon Buffington in his office en masse, nonetheless within a matter of minutes the entire crew was either in Buffington's office or in the doorway. All, with the possible exception of Alexander, were in earshot. The first to arrive and the most vocal was Stedham. Stedham admits yelling at Buffington and demanding to know why the entire crew was being fired. Buffington responded

that the crew hadn't worked to his satisfaction and had engaged in "poor vibration." Stedham shouted he hadn't run a vibrator and Buffington said, "It came from above, that we've been hearing too much commotion about safety and the poor vibration wasn't the only reason, but he had been hearing too much commotion about safety from the crew and that he and Stamp thought they could do better with a whole new crew." Stedham responded it wasn't the crew's fault; that it was the way Buffington scheduled pours and the lousy equipment. Stedham offered "to kick his ass" because he thought Buffington was a slob. Kissler intervened saying to Stedham that he was wasting his time. Stedham, however, continued shouting and admits calling Buffington a "chickenshit," an "asshole," a "mother fucker," and an "unfit supervisor." Stedham says Buffington used similar language in return.

Pendergrass testified that he could hear Stedham yelling before he even arrived and heard Stedham complaining that he didn't run a vibrator, but "busted buckets" to which Buffington replied, "Well, we've been hearing a lot of commotion from the concrete crew about safety and it came down from George [Stamp] to get rid of you all and so I did."

Tony Wells testified he heard Stedham ask Buffington why he was fired. Buffington replied he was fired for "unsatisfactory work." When Stedham asked what was unsatisfactory, Buffington said that "there was poor vibration on the concrete crew and that he had received word from higher up in the office to fire the whole crew." After the General Counsel suggested the topic of safety and some byplay among counsel and myself, the General Counsel asked Wells the following:

> Q. (By Mr. Brennan) Would you please tell us what was said and by whom, regarding complaints?
> A. Mr. Buffington had stated to Steve Stedham that the higher up offices had been hearing complaints from the concrete crew and that he was told to fire the whole crew.
> Q. Do you recall if he said what those complaints were about?
> A. About the project site, about the safety skip that was--that they said was right for the job site and just general complaints.

Larry Jones testified that he heard Stedham ask Buffington, "Kester, what the hell is this? You can't fire me for this." Buffington replied, "Well, that's one of the reasons why I fired you, is your attitude." Jones interrupted saying, "No, you can't tell us its our attitude, now why did you fire us?" Jones says Buffington looked at him and then at Stedham and said, "Well, you don't expect me to keep you on the job with a pour like that. Look at the pour," referring to the August 15 job. Both explained that the vibrators were broken and Stedham said, "Goddamn it

Kester, I wasn't even on the pour, I was running the chute." Jones chimed in saying, "Damn it, Kester, I wasn't even on that pour either, I was tearing apart your broken vibrators that you already knew were broken." Then Jones says Buffington looked at both and "kind of hee-hawed around" and said, "Well, you've got me, the reason you were fired is because you were complaining about safety, and people above my head found out about it. And I had to let you go." Jones went on to say that he had heard "what I wanted to hear and I kind of turned and walked out." Immediately on cross-examination Jones explained his last remark by saying "[Buffington] said that he fired us because we were complaining about safety and that's against the law and I planned on hanging his ass right here in court."

As noted previously, Buffington was called as an adverse witness by the General

Counsel who did not ask him about his version of the August 17 confrontation. Respondent did not choose to recall him during its case.8/

The General Counsel argues that Buffington made admissions against interest to the above employees which are undenied. Indeed, on a cold record it would appear that Respondent abandoned its obligation to defend. However, that would ignore considerations of demeanor and fervor which were apparent to me as I listened to the testimony. Certainly the testimony of Jones shows bias on its face and it rang untrue. Likewise the testimony of Stedham and

8/ The General Counsel did not question Alexander about this incident either; there is some testimony that Alexander was not present, but the record is not clear on the point. The General Counsel did not ask steward Kissler about what occurred either. It may be that he did not hear the admission or he may have left before Stedham induced it. I may also be that it did not occur and he could not have honestly testified that it did.

Pendergrass did not appear convincing with respect to its veracity on the question of whether or not Buffington referred to safety. Only Wells' initial testimony seemed to have an objective view of what occurred in that office. And, even after being cued Wells did not describe anything like Buffington's supposed admission as reported by the other three.9/ His testimony appears to me to be the closet [sic] to the truth. This is not to say that I am discrediting either Pendergrass or Stedham on the basis of deliberate prevarication though that may have been the case; rather it seems to me that they were excessively sensitive to the safety skip matter, were aware of the agreement not to

---

9/Wells' reference to the skip in his cued testimony is unlikely since that was an ironworker-raised matter, which Buffington was not likely to have placed at the feet of the mud crew.

work on August 15 and were ready to ascribe an evil motive to nearly anything negative which occurred. Jones is even worse than those two in this regard. He said that he "wanted to hear" an admission from Buffington; accordingly he did. That Buffington ever uttered such an admission is most doubtful.

In analyzing both Stedham's and Pendergrass' testimony here, I note that both said Buffington remarked that there had been too much "commotion" about safety from the concrete crew. In themselves the statements smack of improbability. The only "commotion" about safety was by the ironworkers over the safety skip on August 15.10/ The mud crew's August 15 decision not to work until the site was approved as

---

10/Steward Kissler's mild involvement in that issue had occurred weeks earlier and can only be considered remote.

safe raised no commotion either and Buffington could not have been referring to that incident. In any case it was submerged by the fact that concrete could not have been placed until the forms were finished. Thus, I do not credit Stedham's and Pendergrass' testimony here.

Frankly, the only probable scenario is that the mud crew employees were discharged because of the results achieved on the August 15 pour, discovered on August 17. No one disagrees with Respondent's conclusion that the work was unacceptable. And, as it involved the structural integrity of a nuclear reactor cooling tower as well as the integrity of the base for the construction crane, the discharge of those who performed the work is not surprising. That is particularly so where Respondent is agreed to be generally responsive to safety issues, and the integrity of the plant and its principal construction tool--the

crane--are put in question. In that context, I therefore discredit those versions based on both internal improbability as well as circumstantial improbability. It follows that the General Counsel's witnesses were inherently unreliable with respect to that issue and that therefore the General Counsel did not make out a prima facie case. In that circumstance it was unnecessary for Respondent to have recalled Buffington for the purpose of making a specific denial.

I recognize that to some extent the poor concrete work was not the direct fault of the crew. Certainly the defective equipment contributed to the poor workmanship. Nonetheless, that deficiency on the part of management does not add anything to the General Counsel's allegation that they were fired for having expressed concern regarding safety practices. No doubt

Respondent accepts its ultimate responsibility for the poor workmanship; in fact, Respondent took several steps to correct it. One of those steps, however, included discharging the entire crew. In view of the awful results achieved by the crew a blanket solution--i.e., getting rid of all involved--would not be an unlikely response. It is also true that the response was unfair to those who had not engaged in the vibrator work or to those who had used faulty equipment. Nonetheless, no law was violated with respect to it; indeed the unfairness was recognized a few weeks later when cooler heads prevailed during the Union's handling of the grievance. There the Union appears to have acknowledged that the crew had performed poorly and a certain amount of discipline was reasonable. Likewise, Respondent acknowledged that its discipline was too drastic and compromised

by reinstating Kissler and permitting the Union to again refer the remainder of the crew for re-employment.

In conclusion I find that the General Counsel has failed to prove by credible evidence that Respondent discharged its concrete crew on August 17 because it believed the crew members had a propensity for engaging in safety matters.

Based on the foregoing findings of fact and the record as a whole, I hereby make the following:

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: [11]

ORDER

IT IS ORDERED that the complaint be, and hereby is, dismissed in its entirety.

Dated: July 16, 1980

/s/
James M. Kennedy
Administrative Law Judge

---

[11] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED OCT 08 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

ZURN INDUSTRIES, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	Nos. 81-7219 81-7331
		ORDER

On Petition for Review and Cross-Application For Enforcement of an Order of the National Labor Relations Board

Before: HUG and SKOPIL, Circuit Judges, and SCHWARZER*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hug and Skopil have voted to reject the suggestion for a rehearing en banc, and Judge Schwarzer recommends rejection of the suggestion.

The full court has been advised of the en banc suggestion and no judge of the

court has requested a vote on it.

Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

*The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

29 CFR ¶ 1977.12 (1979)

(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise 'of any right afforded by this Act.' Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

"(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act, which would entitle employees to walk of the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform

normal job activities because of alleged safety or health hazards.

"(2) However, occasions might arise when an employee is confronted with a choice between not performing asigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such

circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

¶ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

29 § 160 Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon

the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decreee enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject

to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 106, 63 Stat. 104.)

Rule 15. Review or Enforcement of Agency Orders--How Obtained; Intervention

(a) Petition for Review of Order; Joint Petition. Review of an order of an administrative agency, board, commission or officer (hereinafter, the term "agency" shall include agency, board, commission or officer) shall be obtained by filing with the clerk of a court of appeals which is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" shall include a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal). The petition shall specify the parties seeking review and shall designate the

respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency shall be named respondent. The United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petitioin for review and may thereafter proceed as a single petitioner.

(b) Application for Enforcement of Order; Answer; Default; Cross-Application for Enforcement. An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a

concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.

(c) Service of Petition or Application. A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3(d), unless a different manner of service is prescribed by an applicable statute. At

the time of filing, the petitioner shall furnish the clerk with a copy of the petition or application for each respondent. At or before the time of filing a petitiion for review, the petitioner shall serve a copy thereof on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served.

(d) Intervention. Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which

intervention is sought. A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.